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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE ROSE,

Defendant and Appellant.

D051442

(Super. Ct. No. SCD268902)

APPEAL from a judgment of the Superior Court of San Diego County,
Laura Hammes, Judge. Affirmed.

A jury convicted Jesse Rose of inflicting corporal injury on his spouse. He appeals, contending the trial court erred in: (1) refusing to instruct the jury on the defense of accident, and restricting counsel's ability to argue this defense until after defense counsel's closing argument was completed; and (2) admitting improper hearsay evidence. He also contends the prosecutor committed misconduct by diluting the standard of proof during closing argument. We find no prejudicial error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2007, Rose was arrested and charged with corporal injury on his spouse, Tammy. The information further alleged that he suffered a strike prior conviction. At trial, the evidence showed that Tammy and Rose argued over a missing hat and that she accused him of cheating on her because he had not come home the night before. Although Rose wanted to leave and not argue, Tammy continued arguing and tried to hit Rose. Tammy missed when Rose ducked, causing her to strike the wall and make a hole in the plaster. As Tammy pulled her arm back, Rose struck her in the face with his fist, causing her nose to bleed. Tammy went downstairs to the apartment of her sister-in-law, Robin, to get help to stop the bleeding. Rose later joined her downstairs and the couple continued bickering.

In the meantime, police arrived and spoke to Robin. Robin told the police that Rose was inside her apartment with Tammy, that he had hit Tammy and threatened to shoot the police and his family because he did not want to go back to state prison. The police ultimately took Rose into custody and he told one of the officers that he had hit Tammy and needed help for an anger problem.

At trial, Tammy claimed she did not know whether Rose intended to hit her and recalled an incident that occurred in 2003 where Rose threatened her with a pair of scissors. Tammy stated that she was arguing with Rose during the San Diego wildfires when people were watering down their roofs and that her neighbor, a police officer, "got the wrong idea" and called the police.

Rose testified on his own behalf and claimed that he accidentally hit Tammy in the nose as he tried to push her back. He admitted that the police arrested him for the 2003 incident and that he later pleaded guilty to making a threat.

During a discussion on the jury instructions, defense counsel argued that the facts supported an instruction on self-defense and accident. The trial court agreed to instruct on self-defense, but refused to instruct on accident and precluded defense counsel from arguing that Rose was not guilty on that basis. Accordingly, defense counsel argued that Rose simply reacted when Tammy took a swing at him, that he moved his arms to get out of the way and maybe push her back when he struck her in the nose, but that he did not hit her "on purpose" and that the hit was "inadvertent[]." The prosecutor specifically argued that the incident "wasn't an accident" or self-defense.

After reading an instruction regarding the 2003 incident to prove Rose's intent (CALCRIM No. 375), the trial court took a recess because that instruction told the jury that it could consider the 2003 incident on the question of whether Rose acted based on mistake or accident for the charged crime. The trial court decided "in an abundance of caution" to instruct on accident because both counsel "ended up arguing" accident and that it "ought to give the instruction because that's what happened." Alternatively, the trial court suggested not instructing on accident and striking the mention of accident out of CALCRIM No. 375 or allowing defense counsel to reopen and specifically argue accident. After the trial court denied Rose's request for a mistrial, defense counsel concurred with the court's decision to instruct on accident and opted to not reopen closing argument.

The jury found Rose guilty of the charge and he later admitted the prior conviction allegation. The trial court sentenced him to the midterm of three years, doubled to six years for the prior strike conviction. Rose timely appealed.

DISCUSSION

I. *Restriction of Defense Counsel's Argument*

Rose contends the trial court erred when it initially refused to instruct on accident and prohibited defense counsel from arguing this defense and that these errors prejudicially deprived him of his right to due process and a fair trial. While we agree that the trial court erred by initially refusing to instruct on accident and thus erred by limiting the scope of defense counsel's closing argument, we conclude that the limitation of argument did not prejudice Rose.

The accident defense is a claim that the defendant acted without forming the mental state necessary to make his actions a crime. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 (*Gonzales*).) If the crime charged requires general criminal intent, then the defense should apply to acts committed through misfortune or by accident, when it appears there was no general intent. (*People v. Lara* (1996) 44 Cal.App.4th 102, 110.) The crime of inflicting corporal injury to a spouse is a general intent crime meaning that the only intent required was the purpose or willingness to do the act. (*People v. Thurston* (1999) 71 Cal.App.4th 1050, 1053.) A trial court is obligated to instruct the jury on accident if substantial evidence is presented at trial to support an accident theory. (*Gonzales, supra*, 74 Cal.App.4th at p. 390.)

Here, Rose testified that he did not intend to hit Tammy and that he accidentally hit her in the nose when he tried to push her back. Tammy also testified that she did not know

whether Rose intended to hit her. This evidence supported the accident instruction and the trial court erred when it initially refused to give the instruction. (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) Although the trial court corrected this error by instructing the jury on accident, it did so after erroneously refusing to allow defense counsel to argue that the incident was an accident. Under the circumstances, however, we conclude that the error was not prejudicial.

While the trial court erroneously precluded defense counsel from specifically arguing that Rose had "accidentally" hit Tammy, the court did not prevent defense counsel from arguing the facts of the incident or conveying the concept that Rose acted without the necessary intent. Hence, defense counsel argued that Rose "inadvertently" hit Tammy and that the strike was not "on purpose." Additionally, as noted by the trial court, both counsel argued the facts of the case and the credibility of the witnesses and not the elements of the crime. Moreover, defense counsel declined the opportunity to reopen his closing argument to address the accident defense, possibly because he had already addressed the concept in his prior argument.

Thereafter, the trial court properly instructed the jury that it must conclude that Rose acted "intentionally or on purpose" to find him guilty of the charged offense and that he would not be guilty if "he acted without the intent required for that crime, but acted instead accidentally." Accordingly, the jury was well aware that Rose's intent was the critical issue. The jury focused on Rose's intent, asking the trial court whether there was a difference between willful and intentional. The jury also requested to have the deputy's and Rose's entire testimony reread, indicating that it carefully considered the evidence before coming to

a decision. Under these circumstances, any error in restricting defense argument was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

II. *Erroneous Admission of Hearsay Testimony*

At trial, a sheriff's deputy testified, without objection, about Robin's statements that Rose had threatened to shoot the police and his family and stated that he did not want to go back to state prison. During recess, the trial court expressed concern regarding the inflammatory nature of the testimony and counsel agreed that the testimony should be stricken and the jury admonished to disregard it. The trial court instructed the jury that the testimony was inadmissible hearsay that had to be stricken because Robin was not subject to cross-examination and thus the jury could not evaluate her demeanor or whether she had any bias against Rose. The court also told the jury of counsel's stipulation that Rose had never been to prison and that the entire statement could not be considered or discussed during deliberations.

Rose contends his conviction must be reversed because the court's admonishment was insufficient to "unring the bell" and that he was deprived of effective assistance of counsel when defense counsel failed to object to the testimony or move for a mistrial. While we agree that the evidence was inadmissible and inflammatory, we conclude it was not so prejudicial that the taint could not be undone by the trial court's admonishment.

"The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) "[W]e presume jurors can 'unring the bell' and follow

admonishments and instructions designed to cure a trial court error. [Citations.]" (*People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.)

Here, Rose did not deny striking and injuring Tammy and the critical issue at trial was whether he intended to hit her. The erroneously admitted evidence did not pertain to this issue, the trial court promptly admonished the jury to disregard it and further instructed the jury of counsels' stipulation that Rose had never been to prison. The trial court later reinforced its admonition by instructing the jury that it must disregard any evidence stricken from trial and accept as true any stipulated facts. There is no indication in the record that the court's admonition and instructions were insufficient to cure any harm arising from admission of the erroneous evidence and, in light of the uncontroverted evidence of Rose's statements to the police officer that he had hit Tammy and had an anger problem, the error was harmless beyond a reasonable doubt. Following this reasoning, any failure of defense counsel to request a mistrial did not prejudice Rose, and counsel cannot be deemed ineffective. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

III. *Alleged Prosecutorial Misconduct*

Rose contends the prosecutor committed misconduct by misstating the standard of review during rebuttal argument when he argued:

"Look into your hearts, and you'll find and you'll know what happened here. . . . These are two young people living together that have children together, and it's an abusive relationship. Tammy would like nothing more for this to all go away and get back together with [Rose], and I don't know. Maybe they will. I won't have any role there, but what I can do and what I can ask you to do is to intercede here today in this case and to do the right thing and prove beyond a reasonable doubt there's an abiding conviction. If you believe in your heart that he punched his wife in the face, and if you

can say yes, then you're beyond proof -- it's proof beyond a reasonable doubt."

Rose also contends that he was deprived of effective assistance of counsel to the extent defense counsel's failure to object forfeited the issue. We disagree with his contentions.

"[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation]." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) In evaluating a claim of prosecutorial misconduct, we examine the questioned conduct in the context of the whole argument and the instructions to the jury given by the trial court (*People v. Lucas* (1995) 12 Cal.4th 415, 475) and presume that "the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Sanchez* (1995) 12 Cal.4th 1, 70.) To prevail on a claim of misconduct during argument, the defendant must show a reasonable likelihood the jury construed or applied the remarks in an improper manner. (*People v. Ayala* (2000) 23 Cal.4th 225, 284.)

The prosecutor's statement that the jury should "intercede here today in this case and to do the right thing and prove beyond a reasonable doubt there's an abiding conviction" is incomprehensible. The second statement ("[i]f you believe in your heart that he punched his wife in the face, and if you can say yes, then you're beyond proof -- it's proof beyond a reasonable doubt") could not reasonably be understood to trivialize the standard of proof as it did not equate application of the reasonable doubt standard to decisions jurors make in daily life. (Compare, *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 ["[A]rgument that people

apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard"].)

Additionally, the latter comment was not inconsistent with the "abiding conviction" language in CALCRIM No. 220. When viewed in context, the comment suggested to the jury that it should convict Rose if they believed the evidence suggesting he intentionally hit his wife. Simply put, it is not reasonably likely the jury construed the complained of remarks as lowering the prosecution's burden of proof.

Moreover, the trial court instructed the jury correctly on the concept of reasonable doubt (CALCRIM No. 220) and told the jury that if the attorneys' comments on the law conflicted with the court's instructions, it must follow the court's instructions. Once again, we must presume the jury followed the court's instructions. (*People v. Nguyen, supra*, 40 Cal.App.4th at pp. 36-37.) Our conclusion that there was no prosecutorial misconduct defeats Rose's argument that he received ineffective assistance of counsel. (*People v. Marshall, supra*, 13 Cal.4th at pp. 831-832.)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.